

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

**IN THE MATTER OF THE PETITION FOR
A PERMIT REVIEW OF
DISCHARGE PERMIT RENEWAL AND
MODIFICATION, DP-873**

Docket No. WQCC 22-01

**CANNON AIR FORCE BASE (AFB)
UNITED STATES AIR FORCE**

Petitioners,

v.

NEW MEXICO ENVIRONMENT DEPARTMENT

Respondents.

RESPONSE TO MOTION FOR REMAND

I. INTRODUCTION

This matter focuses on the issuance of the discharge permit DP-873 to Cannon Air Force Base on December 15, 2021 (“DP-873”). Pursuant to 20.1.3.15(D) NMAC, the New Mexico Environment Department, Water Protection Division, (“NMED”) hereby submits its response to Petitioner Cannon Air Force Base (AFB) United States Air Force’s (“CAFB”) Opposed Motion for Remand (“Motion”). For the reasons below, NMED respectfully requests that the Water Quality Control Commission (“WQCC”) deny CAFB’s Motion for Remand because the Motion was untimely submitted, and CAFB failed to demonstrate that it had no reasonable opportunity to submit comment or evidence on the permit at issue in this proceeding.

II. STANDARD

Pursuant to the Adjudicatory Procedures – Water Quality Control Commission, 20.1.3 NMAC, the WQCC conducts a permit review on the record compiled before NMED. NMSA 1978, § 74-6-5(Q). The WQCC shall consider only the evidence in the record and the recommendation of the hearing officer. *Id.* This is essential because even though a written factual legal basis is not necessarily required, a reviewing court cannot effectively review a decision based on unexplained conclusions or inadequate support in the record. *Gila Res. Info. Project v. New Mexico Water Quality Control Commission*, 2005-NMCA-139, ¶ 33, 138 N.M. 625. Indeed, there cannot be a lack of support in the record. *Id.* at ¶¶ 36-37. The agency must provide a reasoned basis for its conclusions. *Id.* at ¶ 38 (citing *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786).

However, if a party can show that there was no reasonable opportunity to submit comment on an issue being challenged in a permit review, the WQCC shall order that additional comment or evidence be taken. NMSA 1978, § 74-6-5(R).

III. BACKGROUND

In its Motion, Petitioner CAFB outlines the procedural process for a permit review hearing. Motion at p. 2. In this, CAFB outlines that the WQCC shall review the record compiled by NMED and allow submittal of argument. *Id.* [citing 1978, § 74-6-5(Q)]. CAFB also outlines that the WQCC may designate a hearing officer to review the record and arguments as well as recommending a decision to the WQCC for its consideration. *Id.* Finally, CAFB explains that the WQCC may sustain, modify, or reverse NMED's action based on its review of the evidence contained in the record. *Id.*

Based on this, CAFB argues that NMED believes that the record should not include the information that CAFB purports has not been properly considered by NMED. *Id.* at p. 3. To demonstrate this lack of proper consideration, CAFB indicates that it, "...submitted extensive comments on the draft permit and requested a meeting with NMED to 'work through the significant technical and legal issues contained' in the draft permit." *Id.* CAFB further explains that the actions it ascribes to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") should have resulted in substantive changes to DP-873. CAFB describes in detail its CERCLA actions and that NMED should have engaged in CAFB's CERCLA process and sought out additional information that CAFB did not submit as part of the permitting action before it issued DP-873. *Id.* at pp. 4-6. CAFB concludes by arguing that remand is appropriate and obvious to properly consider significant and relevant information. *Id.* at p. 7.

IV. DISCUSSION

When the New Mexico Legislature enacted the Water Quality Act ("Act"), it established a permitting process and delegated authority to both the WQCC and NMED to administer the Act. NMSA 1978, §§ 74-6-4 and -5. The Legislature included a process by which NMED would issue discharge permits, NMSA 1978, Section 74-6-5, including the procedure by which any interested person would have the opportunity to request a public hearing where they could submit evidence, data, views, or arguments orally or in writing as well as examine the witnesses at the hearing. NMSA 1978, § 74-6-5(G). Within the confines of the Act, the WQCC has established permitting procedures found at 20.6.2 NMAC which include the opportunity to submit comments and request a public hearing. 20.6.2.3108(M) NMAC. The WQCC also established procedures by which a person may request review of a discharge permit after it had been issued. 20.1.3.16

NMAC. These procedures govern CAFB's request for permit review and this Motion, as CAFB acknowledges. Motion at p. 2.

Initially, 20.1.3.16(A)(3) NMAC allows a party to request that the WQCC remand the matter back to NMED if it can demonstrate that there was no reasonable opportunity to submit comment or evidence on an issue being challenged. *Id.* Importantly, a request for remand must be submitted simultaneously with the permit review petition. *Id.* CAFB failed to follow this requirement as it filed its petition for permit review on January 13, 2022; did not seek NMED's position on a motion for remand until January 14, 2022; and did not file its Motion until January 28, 2022. Thus, the Motion is untimely and should be denied for that reason alone.

Should the WQCC need additional reason to deny the Motion, CAFB has also failed to demonstrate that there was no reasonable opportunity to submit comments or evidence. As noted above, the WQCC has established permitting procedures that include the opportunity for public participation and the submittal of comments or evidence. As part of that process, NMED must issue public notice that a draft discharge permit is available for review and provide the opportunity for public comment or a request for public hearing. 20.6.2.3108(H) – (M) NMAC. NMED did so on February 8, 2021. **[Administrative Record ("AR") 004434]**. Indeed, NMED doubled the regulatorily required comment period from 30 days to 60 days. *Id.* This notice also included instructions for requesting a public hearing on the draft discharge permit. *Id.* Critically, a public hearing on a draft discharge permit is intended to be, "'...a fair and impartial adjudication of the issues' in front of a hearing officer...to 'prov[e] the facts relied upon...justify the proposed discharge plan,...and meet[] the requirements of the regulations[.]'" *Communities for Clean Water v. N.M. Water Quality Control Comm'n*, 2018-NMCA-024, ¶ 11, 413 P.3d 877. At such a

hearing, all persons are given a reasonable opportunity to submit data, views, or arguments. *Id.*; NMSA 1978, § 74-6-5(G). It is clear that submitting comments and requesting a public hearing on a draft discharge permit are the established means for this administrative process.

CAFB did not request a permit hearing despite having well beyond the regulatorily-required 30 days to do so. **[AR 004526-004536]**. If CAFB believed that there was additional evidence to be included in the administrative record, it could have either submitted such evidence with its comments or requested a public hearing where it could have submitted written evidence or data, expert testimony, or examined NMED's experts as clearly outlined in the Act and regulations. CAFB had three months to do so, since it requested an extension of time to submit comments, which NMED granted until May 15, 2021, to submit comments. **[AR 004524]**. CAFB submitted, in its own words, extensive comments on May 10, 2021. **[AR 004524-004536]**; Motion at p. 3. The time provided, the regulatory opportunities available, and the fact that CAFB submitted extensive comments all underscore that CAFB had more than reasonable opportunity to submit comments and evidence if they believed such evidence should be in the administrative record.

However, rather than demonstrate an absence of such opportunity in its Motion, CAFB conflates the opportunity to submit comment or evidence and the merits of the permit conditions. *See, e.g.*, Motion at p. 3 (arguing that NMED did not make substantive changes to DP-873 based on CAFB's comments); p. 4 (arguing that CAFB's CERCLA response will accelerate treatment, focus analysis of remedial alternatives, and better inform final remedy decisions); and p. 6 (arguing that DP-873 contains permit conditions that are duplicative of what is already being performed). Discussing the merits of these arguments or that NMED reached improper

conclusions based on the evidence it had before it is not appropriate for a motion for remand. Indeed, CAFB seeks to add new evidence to a record that is already closed.¹

What the evidence in the record does show is that CAFB had greater opportunity to submit comments and evidence than the regulations require, yet it chose not to avail itself of the administrative process. Rather, CAFB seeks exception to the well-established procedure even though the evidence shows otherwise. CAFB states that NMED's response to its comments demonstrates that NMED did not consider its comments. Motion at p. 7. However, as strange as this argument is, it is immaterial to the question at issue in this motion; that is: did CAFB have reasonable opportunity to submit comments and evidence. It did.

V. CONCLUSION

The WQCC's adjudicatory procedures are very clear that a request for remand back to the department "must be filed simultaneously with the permit review petition." 20.1.3.16(A)(3) NMAC. Petitioner CAFB did not do so, but waited over two weeks to file their Motion, belatedly requesting remand. NMED respectfully requests the Motion be denied for that reason.

The WQCC's adjudicatory procedures are also very clear that if a motion for remand is to be granted, the requestor must show to the satisfaction of the Commission that there was no reasonable opportunity to submit comments or evidence on an issue being challenged. 20.1.3.16(A)(3) NMAC. Since the record demonstrates in this case that there was more than

¹ CAFB submitted an Affidavit of Christopher Neal Gierke with its Motion. Motion, Attachment. Mr. Gierke's affidavit explains CAFB's CERCLA response in detail and briefly mentions that NMED did not meet with CAFB officials for a requested meeting to discuss the permit conditions. To the extent that this affidavit fails to explain that CAFB did not have reasonable opportunity to submit comments or evidence, NMED objects to its inclusion and requests that it be stricken. CAFB has not established, nor has the WQCC ordered, that additional evidence is necessary as required by 20.1.3.16(A)(3) NMAC. Pursuant to 20.1.3.16(F)(3) NMAC, the WQCC may only consider the evidence that was before the Department for a permit review.

reasonable opportunity, NMED respectfully requests that the WQCC deny Petitioner's Motion for this reason as well, especially given that Petitioner did not fully avail itself of its opportunities during the public comment period.

Respectfully Submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

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Certificate of Service

I hereby certify that a copy of this Response to Motion for Remand was emailed to the persons listed below on February 14, 2022. A copy will be mailed via First Class Mail upon request.

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